88-1121

Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
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No. -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

STEPHEN G. BRADLEY, SR.
STEPHEN M. BRADLEY, JR.
REGINA BRADLEY, and
TIMOTHY BUCKLEY

Petitioners

v.

UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a civil suit, arising from an automobile accident, which is timely brought in the appropriate United States District Court on a diversity jurisdiction basis against a private party, but wherein the United States on its motion is substituted for the private party, should thereafter be dismissed for the plaintiffs' failure to exhaust the administrative remedies within the strict time standards enumerated in 28 U.S.C. 2675 (a) and 28 U.S.C. 2401 (b), especially when:

(A) The Plaintiffs were innocently without knowledge of the prior individual defendant's governmental status until after the administrative filing deadlines had run? *and*

(B) The plaintiffs' failure to strictly comply with those deadlines did not discernibly prejudice the United States in any way with respect to preparing and presenting a defense on the merits of the case?

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Petitioners

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UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI

LOWER COURT OPINIONS MADE REFERENCE TO WITH STATEMENT OF GROUND UPON WHICH PETITIONERS SEEK TO INVOKE THE JURISDICTION OF THE UNITED STATES SUPREME COURT

I. Order and Opinion of the Honorable Edmund V. Ludwig dismissing the plaintiffs' case No. 87-3829 in the United States District Court for the Esatern District of Pennsylvania. Order entered on March 1, 1988.

II. Order and Opinion of the Third Circuit Court of the United States Court of Appeals known as case No. 88-1217 affirming the dismissal order of Judge Ludwig. Order entered on September 9, 1988.

III. Order of the Third Circuit Court of the United States Court of Appeals denying a rehearing with

respect to the first ruling by that same court. Order entered on October 5, 1988.

The Petitioners appeal directly from the Order of October 5, 1988 by the Third Circuit Court denying a rehearing on the appeal from the original dismissal order issued by Judge Ludwig of the Eastern District Court.

The Petitioners cite 28 U.S.C.S. 1258 as the statutory provision conferring jurisdiction upon the United States Supreme Court to review the judgment of the Third Circuit Court and vicariously thereby the judgment of the Honorable Edmund Ludwig of the United States District Court for the Eastern District of Pennsylvania.

APPLICABLE STATUTES AS ENACTED BY THE CONGRESS OF THE UNITED STATES

28 U.S.C. 2675

(a) An action shall not be instituted upon a claim against the United States for money damages for injury of loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, unless the claimant shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party Complaint, cross-claim, or counterclaim.

28 U.S.C. 2401

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, or notice of final denial of the claim by the agency to which it was presented.

STATEMENT OF THE HISTORY OF THE CASE

This case was started by the Petitioners in the United States District Court for the Eastern District of Pennsylvania on diversity of citizenship jurisdictional grounds. Donald Seibel was named as the original individual defendant. Pursuant to Its motion an Order was granted by that Court substituting the United States as the proper party defendant. The case was then dismissed upon the Summary Judgment motion of the United States citing the petitioners' failure to strictly comply with the requirements of 28 U.S.C. 2675 (a) and 28 U.S.C. 2401 (b). An appeal to the Third Circuit Court upheld that dismissal, and a request for a rehearing of that affirmance was denied.

STATEMENT OF FACTS MATERIAL TO THE CASE

The petitioners were involved in a motor vehicle accident with Mr. Donald Seibel on June 26, 1985. At the time of the accident Mr. Seibel (the original defendant) was working within the scope of his government employment. However, Mr. Seibel did not identify himself at the time of the accident as a government employee. Nor were any indications (no governmental I.D. produced by Seibel; no markings on the vehicle, no uniform) present at the scene to reasonably alert either the investigating police or the petitioners of Mr. Seibel's employment status.

Immediately following the accident Mr. Seibel notified both his governmental agency superior and his own private insurance carrier of the accident. Mr. Seibel also testified that he was "pretty sure" he told his own insurer as well as his superior that he was on government business at the time of the accident. Additionally Mr. Seibel sent a copy of the police accident report to both his insurer and to the Judge Advocate General's Office.

Meanwhile the petitioners through private counsel (not the office of the undersigned herein) sent a letter of representation to Mr. Seibel's insurer not more than two weeks after the accident. The insurance company responded in Mr. Seibel's behalf, and a dialogue of negotiations ensued. At no time did the insurance company disclaim coverage or responsibility for acting as the proper agent for Seibel.

Subsequently, the petitioners' case was transferred to the office of the undersigned. Since the statute was about to expire this office sought an immediate update on settlement negotiations from Seibel's insurer. Again indications were that this matter would eventually be amicably settled between these two parties. However, since little time was left to effect a full settlement agreement, the undersigned office started suit to ensure protection of the petitioners' rights.

Following service on Mr. Seibel negotiations continued with Mr. Seibel's insurer. However, that insurer informed the undersigned office that while negotiations with it were to continue, the complaint would nevertheless be referred out to a legal office for proper responses.

Finally, on July 30, 1987, more than one month after the statute of limitations had run, Mr. Seibel's insurer first announced its knowledge of Mr. Seibel's governmental status.

At that time a motion to substitute the United States as the defendant was made and granted. The case was

then dismissed for petitioners' failure to comply with 28 U.S.C. § 2675 (a) and 28 U.S.C. 2401 (b).

Wherefore, the petitioners brought the appeals based on the question of the case heretofore stated.

ARGUMENT IN SUPPORT OF ALLOWANCE FOR WRIT OF CERTIORARI

I. Conflicts Abound With Respect To The Various Circuit Courts' Interpretations And Applications Of The Notice And Administrative Filing Sections Of The Federal Tort Claims Act

There has been no shortage of litigation on Sections 2675 (a) and 2401 (b) of the Federal Tort Claims Act. However, while cases have been heard in almost all of the Circuit Courts, there is indisputably conflict among each Circuit Court's interpretations of Congress' intentions in enacting the two aforementioned sections. Not surprisingly there has also been a wide discrepancy in how the Circuit Courts have applied those sections in practice.

In short there appear to be four philosophical interpretations of the sections, of which each has spawned its own application question. To wit they are:

(1) *The Sovereign Immunity Intention:* "Only a Mechanical Application Can Serve"

(2) *The Streamlining Intention:* "Practicality v. Prejudice"

(3) *The Plaintiff Scrutiny Approach:* "What Degree of Innocence?"

(4) *The Defendant Scrutiny Approach:* "Is There Unfair Advantage?"

Presently, plaintiffs may bring a civil suit based on the exact same facts and circumstances, but receive a different result depending on the jurisdiction chosen. In

Bialowas v. United States 443 F2d 1047 (3rd Circuit 1971) and *Rogers v. United States* 675 F2d 123 (6th Circuit 1982) the Courts expressed no real need to go beyond the strictest of applications. The reasoning was that Congress had intended to limit the exposure of the United States to suit, and no interference with that limitation should be tolerated. Therefore, only a mechanical application could serve that interpretation of Congress' intention. In short, to paraphrase Gertrude Stein, "a rule is a rule is a rule!"

But other Circuits (while not creating the type of interpretation that the petitioners urge upon this Honorable Court) have moved forward from the simple immunity principle. Yet Cases like *Henderson v. United States* 785 F2d 121 (4th Circuit 1986) still show an unwillingness to go beyond a mechanical Gertrude Stein application. For in *Henderson* much was made of Congress' supposed primary intention of streamlining litigation and not adding to the Federal Docket. The real worry of congress was perceived as court overcrowding and agency and governmental effectiveness, not a fairer and more equitable treatment of all claims. In short, yes these sections of the FTCA might seem harsh, but their practicality of purpose must prevail over their occasional harsh and prejudicial application among various plaintiffs.

However, as more Courts tackled litigation in this area even another view as to Congress' intentions sprung up. The next focus was a combination of practicality and fairness in a very large bureaucratic society. Government must have some advantages, but not at the expense of all plaintiffs. Accordingly, where no fault could be attributed to the plaintiff for failing to comply with the notice and filing sections of the FTCA, then an exception would be granted. *Kelley v. United States* 568 F2d 259 (2nd Circuit 1978). *Staple v. United States* 740 F2d 766 (9th Circuit 1984). In fact even when the Court held against the plaintiff the same reasoning often was

the basis of the decision. *Houston v. United States* 823 F2d 896 (5th Circuit 1987) (Much emphasis given to fact that the plaintiff had an accident with a clearly marked governmental vehicle, but still failed to meet the notice and filing requirements.)

Finally, Courts have also decided cases on the basis of the defendants' actions, either that of the individual governmental employee or the governmental agency itself. In *Wollman v. Gross* 637 F2d 574 (8th Circuit) it was not enough that the plaintiff was without fault as discussed above, but the focus was instead on the fact that the governmental agency involved had never been told by its employee of the incident giving rise to the lawsuit. Thus the Court reasoned that the governmental agency was blameless, and had not willingly used the notice and filing sections to gain an unintended unfair advantage over unsuspecting plaintiffs. Indeed *McGowan v. Williams* 623 F2d 1239 (7th Circuit 1980) makes it clear that if the agency did receive notice from its employee and then merely sat on that knowledge, the advantage it would gain by a mechanical application of the sections would truly constitute an unfair advantage over an innocent plaintiff.

WHEREFORE, this writer urges that this Honorable Court recognize the need to define the purposes and intentions of Congress behind these sections of the FTCA. And once deciding those issues, it would again be urged upon this Honorable Court to set down an all encompassing application test in order to meet those purposes and intentions. With such a ruling all plaintiffs in all areas would be subject to the same rules of the game, and the same facts and circumstances would no longer produce conflicting results.

RESPECTFULLY SUBMITTED,

E. WILLIAM HEVENOR,
Attorney for Petitioners

APPENDIX

APPENDIX

I. ORDER and OPINION of UNITED STATES DISTRICT COURT A-1

II. ORDER and OPINION of THIRD CIRCUIT COURT..... A-5

III. ORDER DENYING A REHEARING of THIRD CIRCUIT'S FIRST ORDER A-17

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEPHEN G. BRADLEY, SR., et al	:	CIVIL ACTION
	:	
vs	:	
	:	
UNITED STATES OF AMERICA	:	NO. 87-3829

CIVIL JUDGMENT

Before Ludwig, J.

AND NOW, this 29th day of February 1988, in accordance with the order dated 2/26/88

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant, the United States of America and against the plaintiffs, Stephen G. Bradley, Sr., Stephen M. Bradley, Jr., Regina Bradley and Timothy Buckley.

BY THE COURT:

ATTEST:_____

Deputy Clerk
Kathryne M. Crispell

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEPHEN G. BRADLEY, SR., et al	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	NO. 87-3829

ORDER

AND NOW, this 26th day of February, 1988 defendant's motion for summary judgment is granted. Fed.R. Civ.P. 56(b).

On June 23, 1987 plaintiffs filed this action against Donald Seibel, alleging diversity and seeking money damages for injuries sustained as a result of an automobile accident that occurred on June 26, 1985. Thereafter, plaintiffs stipulated that Seibel was acting within the scope of his employment with the United States Navy at the time of the accident, and by order of January 4, 1988, the United States was substituted as defendant. 28 U.S.C. §2679(b). *See* Fed.R.Civ.P. 17(a).

Asserting that plaintiffs' failure to file an administrative claim with the Navy within two years of the accident bars this action, the United States moved for summary judgment.

> An action shall not be instituted upon a claim against the United States for money damages for injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. §2675(a) (West Supp. 1987).

Under 28 U.S.C. §2401(b) (West Supp. 1987):

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Plaintiffs admit not filing an administrative claim. They argue the time bar is ineffective in that they were not aware Seibel was in the Navy.

This position cannot be sustained. The filing of an administrative claim is a jurisdictional prerequisite to this type of suit. *E.g., Bialowas v. United States*, 443 F.2d 1047, 1049 (3d Cir. 1971). Ignorance of the tortfeasor's government employment status does not excuse a plaintiff's failure to file a timely administrative claim. *E.g., Wollman v. Gross*, 637 F.2d 544, 549 (8th Cir. 1980), *cert. denied*, 454 U.S. 893, 102 S.Ct. 389, 70 L.Ed.2d 207 (1981); *Flickinger v. United States*, 523 F. Supp. 1372, 1376 (W.D. Pa. 1981); *Fuller v. Daniel*, 483 F. Supp. 928, 929 (N.D. Ala. 1977).

The requirement has been waived by some courts where "fairness dictates." *Kelley v. United States*, 568 F.2d 259, 262 (2d Cir. 1978), *cert. denied*, 439 U.S. 830, 99 S.Ct. 102, 58 L.Ed.2d 124 (1978) (government deliberately waited to substitute itself for its employee until after period for filing administrative claim expired). Here, plaintiffs are not entitled to such relief.

Although Seibel, his supervisor and his insurer were aware of the accident, nothing suggests that they or the Navy knew a lawsuit was imminent. No statute requires that the government or its agents inform injured persons of the employment status of their employees at the time of an accident. *Wilkinson v. Grey*, 677 F.2d 998, 1000 (4th Cir.) *cert. denied*, 459 U.S. 906, 103 S.Ct. 209, 74

L.Ed.2d 167 (1982)[1] Moreover, plaintiffs filed this suit only days before the running of Pennsylvania's applicable two-year statute of limitations. There is no evidence that prior to the filing of suit, plaintiffs inquired of Seibel or otherwise sought to discover his employment status and that the government impeded those efforts. Seibel's employment status was not hidden from plaintiffs. It remained undiscovered because of their failure to investigate and process the claim. "The two-year limitations period [of the Federal Tort Claims Act] was intended to afford those injured . . . by agents of the government a reasonable time to discover the facts, seek legal advice, and prepare their claims." *Steele v. United States*, 599 F.2d 823, 829 n.9 (7th Cir. 1979). Here, plaintiffs did not investigate their claim in a timely fashion.

Therefore, the complaint must be dismissed.

Edmund V. Ludwig, J.

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1. *But see Van Lieu v. United States*, 542 F. Supp. 862, 866 (N.D.N.Y. 1982). There, the court waived the filing requirement where plaintiff's genuine ignorance of defendant's employment status could have been eliminated by defendant and plaintiff filed suit within the prevailing statute of limitations. However, the statute as written and this Circuit's construction of it provide no basis for such and exception.

By enacting the Federal Torts Claim Act, the United States waived sovereign immunity. *United States v. Kubrick*, 444 U.S. 111, 117, 100 S.Ct. 352, 357, 62 L.Ed.2d 259 (1979). In so doing, it could dictate the terms upon which suit would be allowed; and strict observation of such terms is required. *Peterson v. United States*, 694 F.2d 943, 944-45 (3d Cir. 1982); *Bialowas*, 443 F.2d at 1048-49. The duty to inform, which *Van Lieu* would impose, would create a special rule for most accident cases. *Van Lieu*, 542 F. Supp. at 866 (though government not obligated to notify every potential claimant of its identity and involvement, there is a duty to inform in "cases involving uninvited accident to a claimant"). Without an expression of congressional intent, such exception should not be read into the statute. *See Flickinger*, 523 F. Supp. at 1376-77.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1217

BRADLEY, STEPHEN G., SR. and
BRADLEY, STEPHEN M., JR. and
BRADLEY, REGINA and
BRADLEY, TIMOTHY,

Appellants

vs.

UNITED STATES

(D.C. Civil No. 87-3829)
ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SLOVITER, GREENBERG, and COWEN *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit Rule 12(6) August 30, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 1, 1988, be, and the same is hereby affirmed. Costs taxed against the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

Sally Mrvos
CLERK

Certified as a true copy and issued in lieu of a formal mandate on October 13, 1988

Test: Sally Mrvos

Clerk, United States Court of Appeals for the Third Circuit.

Costs taxed in favor of the appellee as follows:
BRIEF $104.00

September 9, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1217

BRADLEY, STEPHEN G., SR. and
BRADLEY, STEPHEN M., JR. and
BRADLEY, REGINA and
BRADLEY, TIMOTHY

Appellants

v.

UNITED STATES

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 87-3829)

Submitted Pursuant to Third Circuit Rule 12(6)
August 30, 1988

BEFORE: SLOVITER, GREENBERG, and
COWEN, *Circuit Judges*

(Filed September 9, 1988)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

This matter is before the court on an appeal from a summary judgment in favor of the defendant, United States of America, in this automobile accident case involving a claim under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et. seq*.

The facts and procedural history are as follows.[1] Plaintiffs, Stephen G. Bradley, Sr., Stephen M. Bradley, Jr., Regina Bradley and Timothy Bradley on June 26, 1985 while in an automobile were involved and injured in an accident with a vehicle owned and operated by Donald Seibel on Interstate 295 in Bellmawr, New Jersey. Seibel was a civilian employee of the United States Navy traveling within the scope of his government employment. Seibel reported the accident to his private insurance carrier and to the Judge

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1. Our scope of review is plenary. *United States v. Adams*, 759 F.2d 1099, 1106 (3d Cir.), *cert. denied*, 474 U.S. 906, 971, 106 S.Ct. 275, 336 (1985).

Advocate General's Office of the Navy. On July 5, 1985 an attorney representing the Bradleys wrote Seibel's insurance carrier and indicated she represented them. On July 26, 1985 the carrier responded in a routine letter asking for medical reports and bills verifying special damages. The carrier's letter stated that when its investigation was completed it would get in touch with the attorney. The matter was not, however, settled with the private carrier. Indeed, we see no indication in the record that serious negotiations were undertaken, and after August 7, 1985 there were no written communications between the Bradleys' attorney and the carrier until subsequent to the filing of this action. The Bradleys assert that neither they nor their attorney knew of Seibel's status as a government employee during this preliminary pre-complaint stage of this case. Accordingly, they did not comply with the notice provisions of the Federal Tort Claims Act. *See* 28 U.S.C. § 2675(a).

On June 23, 1987 the Bradleys filed this action against Seibel, jurisdiction being asserted on the basis of diversity of citizenship.[2] While it appears that Seibel was originally represented by a private attorney, on October 27, 1987 the government filed a motion to substitute the United States as a defendant and to dismiss the complaint as Seibel was a government employee acting within the scope of his employment at the time of the accident. The motion to substitute was granted without objection on January 4, 1988 but the decision on the motion to dismiss was deferred.

On February 29, 1988 the district judge filed an order and memorandum opinion which treated the government's motion as a motion for summary

2. In the Bradleys' appellate brief they recite that the case was referred to their current counsel just prior to the expiration of the time for action under the statute of limitations. Thus, it should not be inferred that counsel named in this opinion was dilatory.

judgment and dismissed the action. He pointed out that the Bradleys stipulated that Seibel was acting within the scope of his employment at the time of the accident and thus the United States had been substituted as defendant. 28 U.S.C. § 2679(b); Fed. R. Civ. P. 17(a). He also indicated that the Bradleys admitted not having filed an administrative claim within two years of the accident so that the action would ordinarily be barred. *See* 28 U.S.C. § 2401(b); 28 U.S.C. § 2675(a). He then rejected the Bradley's legal argument that the action was not time barred, a contention they predicated on the circumstance that prior to July 30, 1987 they were not aware of Seibel's status at the time of the accident. In rejecting this argument the judge reasoned that the filing of an administrative claim was a "jurisdictional prerequisite" to the action. He pointed out that some courts have waived the administrative filing where fairness dictated, but here the Bradleys were not entitled to such relief because the government did not know that a lawsuit was imminent and was not required to advise the Bradleys of Seibel's status. He further noted that the Bradleys had filed the action only days before the two-year Pennsylvania statute of limitations ran and that the Bradleys failed to discover Seibel's status because of a lack of investigation rather than because it was hidden. This appeal followed.

In discussing the merits we first set forth the germane statutes. 28 U.S.C. § 2674 provides that the United States shall be liable under the Federal Tort Claims Act in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. § 1346(b) provides that the district court shall have exclusive jurisdiction over the actions described in 28 U.S.C. § 2674.[3] However, 28 U.S.C. § 2675(a)

3. The United States District Court for the District of the Canal Zone and the District of the Virgin Islands also have jurisdiction in such actions.

provides that no action may be brought for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment unless the claim is first presented to the appropriate federal agency and denied in writing. Pursuant to 28 U.S.C. § 2672 the head of each federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may settle such claims.

Under 28 U.S.C. § 2401(b) "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." The remedy against the United States under 28 U.S.C. § 1346(b) and 28 U.S.C. § 2672 for claims resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment is exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim. 28 U.S.C. § 2679(b).

It is perfectly clear that if the foregoing sections are applied the way they are written, the order of the district court must be affirmed. Seibel was driving his vehicle within the scope of his employment at the time of the accident. Thus, the Bradley's exclusive remedy was against the United States. But the Bradleys did not pursue that remedy by filing a written claim within two years and thus this action is barred.

The Bradleys seek to avoid the plain language of the sections we have cited by arguing that the sections

are intended to give the appropriate agency an opportunity to settle a claim but are not always to be applied to bar actions by plaintiffs failing to comply with them.[4] Thus, in their view, if a party fails to comply with the filing requirements but does not sleep on his rights, causes no prejudice to the government by not filing a claim and had no reason within the filing period to believe that the offending motorist was a government employee within the scope of his employment, the action should not be barred. In support of these contentions, they cite cases from other circuits stating that the strict filing requirements are not always enforced as prerequisites to actions under the Federal Tort Claims Act. *See Kelley v. United States*, 568 F.2d 259 (2d Cir.), *cert. denied*, 439 U.S. 830, 99 S.Ct. 106 (1978); *Van Lieu v. United States*, 542 F. Supp. 862 (N.D.N.Y. 1982); *Harris v. Burris Chemical, Inc.* 490 F. Supp. 968 (N.D. Ga. 1980).

We see no reason for an extended discussion of these cases from other circuits for they are simply not in harmony with our precedents. In *Bialowas v. United States*, 443 F.2d 1047 (3d Cir. 1971), we affirmed an order dismissing the plaintiff's action for failure to file an administrative claim under the Federal Tort Claims Act. There the plaintiff claimed to have been struck by a mail truck. He was sent a claim form by the postal authorities but did not properly complete and file it. He was later sent new forms which he never

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4. In this regard the Bradleys point out that 28 U.S.C. § 2675(a) provides that the provisions of that subsection do not apply to claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim. Here, of course, the claims were presented in a complaint. Accordingly, the proviso is of no help to them. *See Rosario v. American Export-Isbrandtsen Lines, Inc.*, 531 F.2d 1227, 1232-33 (3d Cir.), *cert. denied*, 429 U.S. 857, 97 S.Ct. 156 (1976).

completed or returned. He then commenced his action. We indicated:

> As a sovereign, the United States is immune from suit save as it consents to be sued. The terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit. *United States v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). Although the Federal Tort Claims Act allows suits against the Government for torts committed by its employees while in the scope of their employment, it specifically requires an initial presentation of the claim to the appropriate federal agency and a final denial by that agency as a prerequisite to suit under the Act. This requirement is jurisdictional and cannot be waived.
>
> . . .
>
> Unless a tort claim is submitted to the appropriate federal agency within two years after the claim accrues or unless action is begun within six months of final denial of the claim by the agency to which it was presented, it is forever barred by 28 USCA § 2401(b), as amended July 18, 1966, Pub. L. 89-506, § 7, 80 Stat. 307. Since four years have passed since Bialowas was injured, his right of action against the Government will have lapsed unless he can show that he submitted a valid claim to the Post Office Department. [443 F.2d 1048-49]

We ultimately held that the action was barred as the claim form submitted by the plaintiff was completely deficient.

In *Peterson v. United States*, 694 F.2d 943 (3d Cir. 1982), we reversed orders dismissing a medical malpractice action under the Federal Tort Claims Act entered on the ground that the injured party failed to

file a claim within two years of the accrual of the action, as we determined that there was a material dispute of facts as to when the action accrued. Nevertheless, we reiterated the significance of compliance with the procedural requirements of the rules as follows:

> In the Federal Tort Claims Act, Congress waived the sovereign immunity of the United States. However, the injured person must comply with the applicable terms and the conditions prescribed by Congress. *Honda v. Clark*, 386 U.S. 484, 87 S.Ct. 1188, 18 L.Ed.2d 244 (1967), including strict observance of the limitations period. *Soriano v. United States*, 352 U.S. 270, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957), which cannot be extended by equitable considerations. *Gleason v. United States*, 458 F.2d 171 (3d Cir. 1972). Congress has required an injured party to present his claim to the appropriate agency within two years after the claim accrues. 28 U.S.C. § 2401(b). A claim 'accrues' when the injured party knows both the existence and cause of his injury. *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). [694 F.2d at 944-45]

We also pointed out that in *Bialowas* we held: "Failure to observe the requirements of the [Federal Tort Claims] Act mandates dismissal." *Id.* at 945 n.5. *See also Gleason v. United States*, 458 F.2d 171, 173 (3d Cir. 1972); *Keene Corp. v. United States*, 700 F.2d 836, 841 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct 195 (1983) ("The requirement that a notice of claim be filed is jurisdictional and cannot be waived. Moreover, because the FTCA constitutes a waiver of sovereign immunity, the procedures set forth in Section 2675 must be adhered to strictly.") (omitting citations); *Kozel v. Dunne*, 678 F. Supp. 450 (D.N.J. 1988); *Flickinger v. United States*, 523 F. Supp. 1372, 1375

(W.D. Pa. 1981) ("[C]ourts almost uniformly have dismissed complaints where the plaintiff failed to file a claim with the appropriate federal agency within the two-year limitation period, even though plaintiff's failure to timely submit a claim resulted from his ignorance of defendant's status as a government employee.").

In reaching our result we have not overlooked the circumstance that this action was started against Seibel and not the United States. *See Kelley v. United States*, 568 F.2d at 264. In this regard we observe that the United States is the proper defendant under 28 U.S.C. § 2679(b) and that pursuant to 28 U.S.C. § 2401(b) the claim against it is barred without regard to whether or not it was an original defendant. Further, we think it would be extraordinary if a plaintiff could improve his procedural position by bringing his action against the wrong party. Indeed, we would not have even mentioned the point except for the fact that the *Kelley* court seemed to think it was significant. *See* 568 F.2d at 264. Similarly, we have not ignored the observation of the *Van Lieu* court that the United States, having intervened as a defendant, should take the case as it finds it, *i.e.*, timely, and be deemed to have waived the statute of limitations. 542 F. Supp. at 868. Again, we do not see why the United States should lose its procedural protections because of the Bradleys' error.

While we will affirm the order of the district court we are not holding that in no circumstance could the filing requirements of the Federal Tort Claims Act be relaxed. We do not decide whether there might be a basis for some relaxation if it were in fact impossible for a diligent claimant to present a notice within two years of the claim accruing. In any event, the Bradleys do not present a situation warranting exceptional relief. This was a routine automobile accident case in

which the government employee was immediately identified, though his status was not. Thus, if the Bradleys had promptly filed their action there is no doubt that with minimal discovery they could have ascertained Seibel was a government employee in the scope of his employment so that timely notice could have been given under the Federal Tort Claims Act. Instead they chose to wait. While they were free to do so, they delayed at their own peril. In fact, insofar as we can ascertain from the record, the Bradleys did nothing to prosecute their claim for almost two years between August, 1985 and June, 1987. Thus while our result may seem harsh we are compelled to reach it. *See Barren v. United States*, 839 F.2d 987, 992 (3d Cir. 1988).

The order of February 26, 1988 will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1217

BRADLEY, STEPHEN G., SR. and
BRADLEY, STEPHEN M., JR. and
BRADLEY, REGINA and
BRADLEY, TIMOTHY,

Appellants

v.

UNITED STATES

D.C. Civil No. 87-3829

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active services, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the court in banc, is denied.

BY THE COURT,

Circuit Judge

Dated: October 5, 1988

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1121

In the Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN G. BRADLEY, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioners' tort action is barred by their failure to file an administrative claim within two years of the automobile accident underlying their action.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A16) is reported at 856 F.2d 575. The order of the district court (Pet. App. A2-A4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1988. A petition for rehearing was denied on October 5, 1988 (Pet. App. A17). The petition for a writ of certiorari was filed on January 3, 1989. Petitioners invoke (Pet. 2) this Court's jurisdiction under 28 U.S.C. 1258.[1]

[1] Although petitioners cited 28 U.S.C. 1258, which governs review of decisions of the Supreme Court of Puerto Rico, review is appropriate under 28 U.S.C. 1254(1).

STATEMENT

In June 1985 the petitioners were injured in an automobile accident with a vehicle owned and operated by Donald Seibel, a civilian employee of the United States Navy traveling on business. Petitioners subsequently filed a complaint against Seibel in federal district court three days before the applicable two-year state statute of limitations would have expired. Petitioners assert that they were not aware at that time that Seibel was a government employee. Pet. App. A8-A9.

Pursuant to the Federal Drivers Act, 28 U.S.C. 2679(b)-(e) (1982), the government certified that Seibel was acting within the scope of his employment at the time of the accident and sought to substitute the United States as the defendant under Section 2679(d). The government also argued that, following the substitution, the complaint should be dismissed because the petitioners had not filed an administrative claim with the Navy within two years of the accident, as required under the Federal Tort Claims Act by 28 U.S.C. 2401(b).

The district court substituted the United States as defendant and then dismissed the complaint, holding that the filing of an administrative claim "is a jurisdictional prerequisite to suit." Pet. App. A3. The court rejected petitioners' argument that they should be excused from filing a claim under the circumstances of this case. It concluded that, while some courts have waived the administrative claim requirement "where 'fairness dictates' " (*ibid.*, quoting *Kelley* v. *United States*, 568 F.2d 259, 262 (2d Cir.), cert. denied, 439 U.S. 830 (1978)), waiver should not be allowed here because the petitioners did not inquire about Seibel's employment status within the two-year limitations period. Pet. App. A3-A4.

The court of appeals affirmed. Pet. App. A7-A16. After noting that Section 2401(b) provides that a tort claimant must file an administrative claim within two years after the claim accrues and that, under Section 2679(b), the remedy against the United States is exclusive, the court stated: "It is perfectly clear that if the foregoing sections are applied the way they are written, the order of the district court must be affirmed. Seibel was driving his vehicle within the scope of his employment at the time of the accident. Thus, [petitioners'] exclusive remedy was against the United States. But [petitioners] did not pursue that remedy by filing a written claim within two years and thus this action is barred." Pet. App. A11. With respect to cases such as *Kelley,* the court stated that it was not deciding "whether there might be a basis for some relaxation if it were in fact impossible for a diligent claimant to present a notice within two years of the claim accruing" because petitioners "do not present a situation warranting exceptional relief." *Id.* at A15.

DISCUSSION

The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (Nov. 18, 1988), which was enacted after the court of appeals issued its decision and denied rehearing in the present case, amended Section 2679 to change the rules governing tort claims such as this.[2] Section 2679(d) now

[2] The main effect of the Act is to overrule *Westfall* v. *Ervin,* No. 86-714 (Jan. 13, 1988), in which this Court concluded that federal employees acting within the scope of their employment could be sued in state common law tort actions unless they were exercising discretion. H.R. Rep. No. 700, 100th Cong., 2d Sess. 2-4 (1988). The Act expands the provision that was formerly the Federal Drivers Act so that the United States is to be substituted as the defendant in any common law tort action whenever a government employee was acting within the

provides: "Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim * * *, such claim shall be deemed to be timely presented under section 2401(b) of this title if – (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and (B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action." Pub. L. No. 100-694, § 6, 102 Stat. 4565. In light of this recent amendment, problems such as the one presented here should not arise in the future. Since petitioners' claim would have been timely if it had been filed on the date they commenced their civil action, they would have been able to file an administrative claim within 60 days after the district court dismissed their claim. For that reason, any differences between the decision below and decisions such as *Kelley* are of little if any prospective importance; thus, plenary review of the question presented by petitioners is not warranted.

The Act expressly provides that it applies to pending cases. Pub. L. No. 100-694, § 8(b), 102 Stat. 4565-4566. However, petitioners were not able to file an administrative claim that would be deemed timely filed under the amended Section 2679(d) because the district court dismissed their complaint more than 60 days before the amendment was enacted.[3] Nor are they aided by Section

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scope of his employment at the time of the allegedly tortious act. Pub. L. 100-694, § 5, 102 Stat. 4564 (amending 28 U.S.C. 2679(b)).

[3] The district court dismissed the case in February 1988. Pet. App. A1. The court of appeals affirmed in September (*id.* at A7) and denied rehearing en banc in October (*id.* at A17). The new Act took effect in November, and the petition for a writ of certiorari was filed in January 1989.

8(d) of the Act, 102 Stat. 4566, which provides additional time to claimants whose claims accrued before the Act was enacted, but only when the governing state statute of limitations, unlike the applicable statute of limitations here, is longer than two years.[4]

We believe that Congress generally intended to allow persons such as petitioners to file administrative claims that would be deemed timely.[5] This case in its present posture fails to qualify solely because of the highly unusual circumstance that it was on appeal, rather than in the district court, when the Act was enacted—a situation we think Congress failed to deal with only through inadvertence. We therefore suggest that this Court vacate the judgment below and remand with instructions that the district court enter a new judgment of dismissal. Petitioners could then file an administrative claim that would be deemed timely under amended Section 2679(d).

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[4] Section 8(d) provides: "With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented * * * shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act."

[5] The House Report stated: "Persons who have initiated a lawsuit but never submitted an administrative claim to the Government will not lose their right to pursue a lawsuit for having failed to submit such a claim." H.R. Rep. No. 700, 100th Cong., 2d Sess. 8 (1988).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded in order that the district court may enter a new judgment of dismissal.

Respectfully submitted.

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MARCH 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00142